Hamidi bin Mohd Isa & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–148 OF 2009
SULONG MATJERAIE, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA
20 NOVEMBER 2012

Criminal Law — Dangerous drugs — Trafficking — Dangerous drugs found in bag in boot of car — Whether trial judge erred in finding that appellants had knowledge of contents of bag — Whether trial judge erred in his finding that appellants had failed to raise reasonable doubt — Whether there were serious errors committed in findings of fact by trial judge — Whether appellants had reasonable explanation for fleeing from arrest — Whether trial judge erred in finding that appellants had mens rea possession

Evidence — Exhibits — Break in chain of evidence — Whether there was break in chain of evidence relating to drug exhibits — Whether drugs exhibited in court were same drugs seized by police

On 25 September 2007 two police officers, who were on a crime prevention patrol, had observed the driver of a Proton Wira car ('the car') acting suspiciously. They had directed the car, which was driven by the second appellant to stop for inspection. However, the second appellant had sped off and crashed into another vehicle before jumping out of the car and hiding in a large concrete drain. The first appellant, who was travelling as a passenger in the car, had also jumped out of the car and made for the same drain. One of the two police officers had guarded the car abandoned by the appellants, while the second police officer gave chase and apprehended the appellants who were both hiding in the drain. With the aid of two other police officers who arrived at the scene of the crime, the two appellants were apprehended and brought to the area where they had abandoned the car, which was being guarded by the first police officer. The police officers carried out an examination of the boot of the car and found two bags. One bag contained 28 slabs of compressed dried plant material, while the second bag contained 29 slabs of compressed dried plant material. These 57 slabs were later confirmed by the chemist in the chemist report to be 53,645g of cannabis. The appellants, who were both illegal immigrants, were charged with trafficking in the cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the trial the trial judge found that the prosecution had succeeded in establishing a prima facie case and called for the appellants to enter their defence. Both appellants denied knowledge of the drugs. In essence the defence of the first appellant was that he was merely a

passenger in the car. The first appellant claimed that he was on his way to Kepong to change money and that the second appellant had agreed to give him a lift. The essence of the defence of the second appellant was that he had borrowed the car from its owner SP9 for the use of his friends Rustam and Adi. The second appellant claimed that after Adi had used the car and while he was returning the car to SP9 he was arrested by the police. At the end of the defence case the trial judge found that the defence had failed to raise any reasonable doubt in the prosecution case. The appellants were convicted and sentenced to death. This was their appeal against that conviction and sentence. The appellants argued that on the evidence there was some doubt as to their being the persons who were in the car that was directed to stop for inspection by the police. With regard to conduct, both appellants submitted that they had fled from the police because they were both illegal immigrants without valid documents and not because they knew of the cannabis or had a common intention of trafficking. The appellants further submitted that there was doubt as to the identity of the drug exhibits and that it was not safe for the court to accept that the drugs exhibited in court were the same drugs seized from the car.

Held, dismissing the appeal:

(1) Based on the evidence adduced there was no doubt on the identities of the two appellants as being the persons who were in the car that the police officers had directed to stop for inspection (see para 10).

(2) If the first appellant's defence that he was visiting a money changer was true then he would have been carrying money on his person at the time of his arrest. However, the evidence showed that no money was recovered from him. Further, based on the discrepancies in the second appellant's defence the trial judge was right in his finding that the second appellant's defence was an afterthought created in order to raise the probability that the drugs belonged to Adi and/or Rastam. The second appellant's suggestion that the drugs could have belonged to the owner of the car ie SP9, also had no basis (see para 13).

(3) The appellants' conduct on fleeing from the police should be weighed against the circumstances of the case. In the present appeal the appellants had ignored the orders to stop the car and proceeded to flee until they were prevented by circumstances from doing so. Having considered the facts surrounding the conduct of the appellants it was found that the trial judge had correctly exercised his discretion in coming to the conclusion that in the circumstances of this case, the conduct of the appellants was a factor, amongst others, to infer that the appellants had the necessary knowledge that there were drugs in the car. The appellants' conduct was not compatible with their explanation that they ran because they had no valid documents (see paras 15 & 18).

(4) The trial judge had not erred in taking judicial notice of the strong scent

of the cannabis. In any event, the grounds of judgment showed that the strong scent of the cannabis was only one of the circumstances that the trial judge had relied on to infer knowledge. There was sufficient evidence the combined effect of which was sufficient for the trial judge to make the affirmative finding that the appellants were in possession of the drugs (see para 19).

(5) Although the appellants claimed that it was not safe for the court to accept that the drugs exhibited in court were the same drugs seized from the car, the trial judge found no break in the chain of evidence from the time the car was abandoned by the appellants until the exhibits were handed over by the investigation officer to the chemist who carried out the analysis of the drugs. As the movement of the drugs had been sufficiently explained through the evidence of the arresting officer, the investigation officer and the chemist there was no reason to disagree with the findings of the trial judge in this regard. Further, the issue of the differences in the weight stated in the original charge, the amended charge and the drug exhibits was insufficient to raise any doubt as to the identity of the drug exhibits (see paras 21–22).

(6) The appellants were the only occupants of the car prior to their arrest. By virtue of being in custody and control of the car coupled with their conduct in running away from the scene of the crime both the appellants had custody and control and knowledge of the drugs. The appellants failure to provide a plausible explanation to rebut the presumption under s 37(da) of the DDA showed that the trial judge was correct in finding that the appellants had mens rea possession. The totality of the evidence showed that the appellants were trafficking in the cannabis (see para 23).

[Bahasa Malaysia summary

Pada 25 September 2007 dua orang pegawai polis, yang membuat rondaan pencegahan jenayah, memerhatikan seorang pemandu kereta Proton Wira (kereta tersebut) yang mencurigakan. Mereka mengarahkan kereta, yang dipandu oleh perayu kedua, supaya berhenti bagi pemeriksaan. Walau bagaimanapun, perayu kedua memecut dan melanggar sebuah kereta lain sebelum melompat keluar dari kereta tersebut dan menyembunyikan diri di dalam sebuah longkang konkrit besar. Perayu pertama, yang berada dalam kereta sebagai penumpang, juga melompat keluar dari kereta tersebut dan berlari ke arah longkang yang sama. Salah seorang daripada dua pegawai polis telah menjaga kereta yang diabaikan oleh perayu-perayu, sementara pegawai polis kedua mengejar dan menangkap perayu-perayu yang kedua-duanya bersembunyi di dalam longkang. Dengan bantuan dua pegawai polis yang lain yang tiba di tempat kejadian jenayah, kedua-dua perayu telah ditangkap dan dibawa ke kawasan di mana mereka mengabaikan kereta tersebut, yang sedang dijaga oleh pegawai polis pertama. Pegawai-pegawai polis tersebut membuat pemeriksaan but kereta dan menjumpai dua beg. Satu beg mengandungi 28

ketulan mampat daun-daun kering, manakala beg kedua mengandungi 29 ketulan mampat daun-daun kering. Kesemua 57 ketulan ini kemudiannya disahkan oleh ahli kimia di dalam laporan kimianya sebagai 53,645g kanabis. Perayu-perayu, yang kedua-duanya pendatang tanpa izin, dituduh dengan pengedaran kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Semasa perbicaraan, hakim perbicaraaan mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie dan memanggil perayu-perayu membela diri. Kedua-dua perayu menafikan pengetahuan tentang dadah tersebut. Pada asasnya pembelaan perayu pertama adalah bahawa dia hanyalah penumpang di dalam kereta tersebut. Perayu pertama mendakwa bahawa dia dalam perjalanan ke Kepong untuk menukar wang dan bahawa perayu kedua telah bersetuju untuk menumpangkannya. Asas pembelaan defendan kedua adalah bahawa dia telah meminjam kereta tersebut daripada pemiliknya SP9 untuk kegunaan kawannya Rustam dan Adi. Perayu kedua menyatakan bahawa selepas Adi menggunakan kereta tersebut dan semasa dia dalam perjalanan memulangkan kereta kepada SP9 dia ditangkap polis. Di akhir kes pembelaan hakim perbicaraan mendapati bahawa pembelaan telah gagal membangkitkan apa-apa keraguan munasabah di dalam kes pendakwaan. Perayu-perayu disabitkan dan dihukum mati. Ini adalah rayuan mereka terhadap sabitan dan hukuman. Perayu-perayu menghujah bahawa atas keterangan terdapat keraguan sama ada mereka adalah orang di dalam kereta tersebut yang diarahkan berhenti untuk pemeriksaan oleh pihak polis. Berkaitan tindakan, kedua-dua perayu menghujah bahawa mereka telah melarikan diri daripada polis kerana kedua-dua mereka adalah pendatang tanpa izin tanpa dokumen-dokumen sah dan bukan kerana mereka mengetahui tentang kanabis atau mempunyai niat bersama untuk mengedar. Perayu-perayu selanjutnya menghujah bahawa terdapat keraguan berkaitan identiti ekshibit dadah dan bahawa ia tidak selamat bagi mahkamah menerima bahawa dadah yang diekshibitkan di mahkamah adalah sama dengan dadah yang dirampas dari kereta tersebut.

Diputuskan, menolak rayuan:

(1) Berdasarkan kepada keterangan yang dikemukakan tidak terdapat keraguan berkaitan dengan identiti kedua-dua perayu adalah orang yang sama di dalam kereta yang telah diarahkan oleh pegawai-pegawai polis tersebut untuk berhenti (lihat perenggan 10).

(2) Jika pembelaan perayu pertama bahawa dia sedang melawat penukar matawang adalah benar maka dia sepatutnya membawa wang dengannya semasa ditangkap. Walau bagaimanapun, keterangan menunjukkan bahawa tidak ada wang yang dijumpai padanya. Selanjutnya, berdasarkan kepada percanggahan dalam pembelaan perayu kedua hakim perbicaraan betul dalam dapatannya bahawa pembelaan perayu kedua adalah fikiran semula yang direka untuk membangkitkan kemungkinan bahawa dadah-dadah tersebut kepunyaan Adi dan/atau

Rustam. Saranan perayu kedua bahawa dadah-dadah tersebut mungkin kepunyaan pemilik kereta tersebut iaitu SP9, juga tidak berasas (lihat perenggan 13).

(3) Tindakan perayu melarikan diri daripada polis perlu ditimbang terhadap keadaan kes. Di dalam rayuan ini, perayu-perayu tidak mengendahkan perintah memberhentikan kereta dan terus melarikan diri sehingga mereka dihalang oleh keadaan daripada berbuat demikian. Mempertimbangkan fakta merangkumi tindakan perayu-perayu, didapati bahawa hakim perbicaraan telah melaksanakan budi bicaranya dengan betul dalam membuat keputusan bahawa dalam keadaan kes ini, tindakan perayu-perayhu adalah faktor, antara lain, untuk menyimpulkan bahawa perayu-perayu mempunyai pengetahuan yang diperlukan bahawa terdapat dadah di dalam kereta tersebut. Tindakan perayu-perayu tidak bersesuaian dengan penjelasan mereka bahawa mereka melarikan diri kerana tidak mempunyai dokumen-dokumen sah (lihat perenggan 15–18).

(4) Hakim perbicaraan tidak terkhilaf dalam membuat pengiktirafan kehakiman tentang bau kuat kanabis tersebut. Walau apapun, alasan penghakiman menunjukkan bahawa bau kuat kanabis hanyalah salah satu keadaan yang disandarkan oleh hakim untuk menyimpulkan pengetahuan. Terdapat keterangan yang mencukupi yang kesan keseluruhannya mencukupi untuk hakim perbicaraan membuat penemuan afirmatif bahawa perayu-perayu mempunyai milikan dadah (lihat perenggan 19).

(5) Walaupun perayu-perayu menghujah bahawa ia tidak selamat untuk mahkamah menerima bahawa dadah yang diekshibitkan di mahkamah adalah dadah yang sama yang dirampas dari dalam kereta, hakim perbicaraan mendapati tidak ada pemutusan rantaian keterangan dari masa kereta tersebut diabaikan oleh perayu-perayu sehingga ekshibit-ekshibit tersebut diberikan oleh pegawai penyiasat kepada ahli kimia yang membuat analisis dadah tersebut. Oleh sebab penjalanan dadah telah dijelaskan secukupnya melalui keterangan pegawai yang menangkap, pegawai penyiasat dan ahli kimia tidak ada alasan untuk tidak bersetuju dengan dapatan hakim perbicaraan dalam perkara ini. Selanjutnya, isu perbezaan berat yang dinyatakan dalam pertuduhan asal, pertuduhan dipinda dan ekshibit dadah adalah tidak mencukupi untuk membangkitkan keraguan terhadap identiti ekshibit dadah (lihat perenggan 21–22).

(6) Perayu-perayu sahaja yang berada di dalam kereta sebelum penangkapan mereka. Atas alasan mereka mempunyai kawalan dan jagaan kereta bersama dengan tindakan mereka melarikan diri dari tempat kejadian jenayah kedua-dua perayu mempunyai kawalan dan jagaan dadah tersebut. Kegagalan perayu-perayu mengemukakan penjelasan yang

boleh dipercayai untuk mematahkan anggapan di bawah s 37(da) ADB menunjukkan bahawa hakim perbicaraan betul dalam penemuan bahawa perayu-perayu mempunyai mens rea milikan. Keseluruhan keterangan menunjukkan bahawa perayu-perayu mengedar kanabis tersebut (lihat perenggan 23).]

Notes

For cases on break in chain of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1625–1642.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 205–300.

Cases referred to

Director of Public Prosecutor v Brooks [1974] 2 All ER 840, PC (refd)
Ibrahim Mohamad & Anor v PP [2011] 4 CLJ 113, FC (refd)
Johar bin Mustapha v PP [2009] 6 MLJ 593; [2009] 6 CLJ 193 (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Mohd Radzi Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
Ridwan v PP [2010] 4 CLJ 570, CA (refd)
Saad Ibrahim v PP [1968] 1 MLJ 158; [1967] 1 LNS 154 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132; [1982] CLJ 340 (Rep); [1982] CLJ 188, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(a)
Evidence Act 1950 ss 8, 9

Appeal from: Criminal Trial No 45–29 of 2008 (High Court, Kuala Lumpur)

Saha Deva A Arunasalam (Saha & Associates) for the first appellant.
Muhammad Fairuz bin Ahmad Yusof (Nazri Aziz & Wong) for the second appellant.
Tetralina bt Ahmad Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The two appellants herein were charged with jointly trafficking in 53,645g of cannabis on 25 September 2007 at Jalan Api-Api 5, Kepong Baru, Kuala Lumpur, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the defence case the learned trial judge found that the appellants had failed to raise a reasonable doubt in the prosecution case. Both

the appellants were found guilty accordingly and were sentenced to death. The appellants appealed against their convictions and sentences. We heard the appeal and having considered the record of appeal and the submissions made we found no merit in the appeals. Consequently we dismissed the appeals and affirmed the convictions and sentences imposed on the appellants by the High Court.

[2] The facts of the case had been fully laid out in the learned trial judge's grounds of judgment. For the purpose of this judgment we reproduce the salient facts. On 25 September 2007 at about 4.35pm Cpl Mohd Sayuti Mohd ('SP3') and L/Cpl Mohd Azman Zainal Abidin ('SP6') were on their crime-prevention patrol in Kepong. They saw a Proton Wira motorcar with two males (identified as both the appellants) being driven in a suspicious manner. The said car was driven by the second appellant. Suspecting that the driver may not possess a valid driving licence, SP6 who was driving the police patrol car sounded the car horn to direct the car to stop for inspection. However the said car sped off and a chase ensued. The said car then crashed into another car parked by the side of the road. The driver of the car, the second appellant, jumped out of the vehicle and ran towards a large concrete drain. The first appellant, the passenger, then came out of the car and ran in the same direction as the second appellant. SP3 alighted from the police car and chased after the first appellant. SP6 guarded the Proton Wira car that had been abandoned by the appellants. SP6 also took possession of the ignition key that had been left in the vehicle.

[3] At about the same time SP7 L/Cpl Nickelaus Joseph together with L/Cpl Mohd Firdaus arrived in another police car. They came upon the second appellant. They sounded the siren but the second appellant jumped into the concrete drain where the first appellant had jumped into. The water level in the drain was waist-high. SP7 chased after the second appellant. By then the incident had attracted the attention of the public and a large crowd had gathered. After about 10 minutes the first appellant surrendered to SP3 who conducted a search on his body but found no identification documents. The first appellant told SP3 he is an Achenese and his name is 'Hamidi bin Mohd Isa'. Meanwhile SP7 had gone down the drain and arrested and handcuffed the second appellant. SP7 searched the second appellant and found a foreign identification card, a local identity card and a handphone. The foreign identification card bore the name 'Jauhari bin Tamrin' whilst the local identity card bore the name 'Roslan'.

[4] Both the appellants were then brought to the Proton Wira car that they had abandoned which was being guarded by SP6. An inspection was conducted on the vehicle. From the boot of the car SP3 found two bags, one containing 28 and the other 29 slabs of compressed dried plant material

suspected to be cannabis. The exhibits were then taken to the Sentul Police District Headquarters ('IPD Sentul') by SP3 in the Proton Wira motorcar. SP3 drove the car. The appellants were taken to IPD Sentul by SP7 in his patrol car.

[5] SP3 arrived at the IPD Sentul at about 6.30pm. He marked the bag bearing the brand name 'Niker Topstar' as 'A' and the 28 slabs in the bag as 'A1'–'A28'. SP3 marked the other bag bearing the brand name 'Defender Sportstar' as 'B' and the 29 slabs found in it as 'B1'–'B29'. SP3 also prepared and signed a search list exh P14 which was also signed by the first appellant. SP3 further made a report exh P15 concerning the arrest of the first appellant and the discovery of the two bags containing the drugs. In his report P15, SP3 noted that the gross weight of the two bags was 57kg. SP3 handed over both the appellants, the Proton Wira motorcar, the two marked bags and the exhibits found in them to the investigating officer ('IO') SP8 Chief Inspector Pua Koh Shih. Both SP3 and SP8 signed the 'Perakuan Serah Dan Terima Barang Kes' (exh P16). SP7 had also made a report (exh P29) and a search list in which was listed one identity card in the name of Roslan bin Hamid, one foreign national registration card in the name of Jauhari bin Tamrin, one Nokia handphone and one wallet (exh P30). Both SP7 and the second appellant signed exh P30. SP7 also handed over the second appellant and the items seized from him to SP8. According to SP8 both the appellants were illegal immigrants and the local identity card in the name of 'Roslan' which was recovered from the second appellant was forged. The second appellant also did not possess a valid driving licence.

[6] The IO SP8 then brought the appellants and all the exhibits to the Kuala Lumpur Police Headquarters ('IPD Kuala Lumpur'). The Proton Wira car was also brought back to the IPD Kuala Lumpur. At the IPD Kuala Lumpur SP8 instructed one Cpl Daniel to take two photographs of the exhibits (exhs P11B and 11C) and four photographs of the Proton Wira car (exhs P12A-D). After photographs of the drugs were taken, SP8 took the drugs and kept them in a locked steel cabinet in his room. He testified only he had access to the room and the cabinet. On 28 September 2007 SP8 took the drugs packed in two boxes marked 'E' and 'EE' and sealed with 'PDRM 422' to the Chemistry Department. At the Chemistry Department he handed over the two boxes to SP4. Unfortunately SP4 refused to accept the two boxes of exhibits for analysis on the ground that the two boxes were insufficient for the purpose of re-packing the drugs after analysis. SP8 then returned to his office where he re-packed the drugs into six boxes which he marked as E, EE, EEE, F, FF and FFF and sealed them and with 'PDRM 422' and wrote the report number and his name (exhs P5–P10). He then kept the boxes in the steel cabinet and on 1 October 2007 he handed over the six boxes to the chemist SP5 at the Chemistry Department. SP5 confirmed receipt of the six boxes and issued an official receipt No (PJ) FOR 8654/07–0 (exh P18). She also affixed the

laboratory number on all the six boxes. On the same day SP5 carried out her analysis on the contents of all the six boxes. SP5 then prepared the chemist report (exh P19) which confirmed that all the compressed dried plant material was cannabis as defined under s 2 of the Act totaling 53,645g in weight.

[7] At the end of the prosecution case the learned trial judge found that the prosecution had proved a prima facie case against both the appellants. The first appellant in his defence admitted that he is an illegal immigrant. He worked at the Selayang Market. According to him he stayed in Selayang Baru together with two others named 'Adi' and 'Rustam'. The first appellant testified that on the day he was arrested, he had gone home from work at about 1pm. Both Adi and Rustam were not in. He slept and woke up at about 3pm and both Adi and Rustam were back. He asked them where they were going and Adi said that he wanted to return the car that he had borrowed. The first appellant then told them that he wanted a lift because he wanted to change money to send back home. The first appellant said that Adi drove the car to the second appellant's house. According to him it was there that he got to know the second appellant. Adi then handed the car to the second appellant and told the second appellant that the first appellant wanted to go to Kepong to change money. Both Adi and Rustam then left. The second appellant drove the car towards Kepong.

[8] The second appellant in his defence stated that on 25 September 2007 Adi and Rustam had come to his house. Adi was his friend but that was the first time he met Rustam. Adi told him that they needed to rent a car to go to Seremban. The second appellant had a Kancil car but he could not lend his car to Adi. So he called SP9 at his work place in Kelana Jaya but he did not tell SP9 that he wanted to borrow the car for Adi because he knew that SP9 would not agree to lend his car to Adi. He together with Adi and Rustam then went to Kelana Jaya to collect the car key from SP9 and from there they proceeded to Jinjang where the car was parked as SP9 stayed in Jinjang. Adi then took the car and left with Rustam. The second appellant said that about 20 minutes after he arrived home Adi, Rustam and the first appellant came to his house and Adi told him that he needed to use the car till night. The second appellant told Adi that he had already told SP9 that he would return the car that evening. So the second appellant called SP9 but SP9 said that he needed to use the car. The second appellant then said that he would return the car in the evening and take the car again that night to which SP9 agreed. The second appellant said that Adi told him that the first appellant wanted to go to Kepong and asked him to send the first appellant to Kepong. It was when they were on their way to Kepong that they were arrested.

[9] At the end of the defence case the learned trial judge found that the

defence had failed to raise any reasonable doubt in the prosecution case and had failed to rebut the presumption under s 37(da) of the Act. His Lordship concluded as follows:

> Segala keterangan pembelaan oleh kedua-dua tertuduh gagal bukan sahaja menimbulkan sebarang keraguan di dalam kes pendakwaan malah gagal mematahkan anggapan mengedar di bawah s 37(da) ke atas kedua-dua tertuduh. Di dalam menilai keseluruhan kes, mahkamah mendapati pihak pendakwaan membuktikan kesnya tanpa sebarang keraguan yang munasabah.

THE APPEAL

[10] In the appeal before us, learned counsel for the first appellant submitted that the prosecution had failed to prove the identity of the first appellant as the passenger in the Proton Wira motorcar driven by the second appellant. The learned deputy public prosecutor ('DPP') on the other hand submitted that there was sufficient evidence on the identities of both appellants. We agreed with the learned DPP. The evidence showed that during the car chase, the distance between the Proton Wira and the police patrol car driven by SP6 was only about one or two cars away. When the second appellant lost control of the car and the car stalled, SP3 saw the first appellant alight from the car and ran towards the concrete drain and jumped into the drain. SP3 gave chase and after about ten minutes in the drain, the first appellant surrendered to SP3. There was no evidence that during this time SP3's attention was distracted away from the first appellant, the object of his pursuit. After the first appellant had surrendered himself to SP3, he identified himself to SP3 as Hamidi bin Mohd Isa, an Achenese aged 28 years old. With regard to the second appellant, the evidence showed that he too alighted from the Proton Wira and ran away and was pursued by SP7. Like the first appellant, he too jumped into the concrete drain. SP7 entered the drain and arrested the second appellant. There was no evidence of any other person in the drain at the material time. Both the appellants were then brought to IPD Sentul. Therefore on the evidence we were unable to agree with learned counsel that there was doubt on the identities of the two appellants as being the persons who were in the Proton Wira.

[11] Learned counsel for the first appellant further submitted that the first appellant was merely a passenger in the car and there was no direct evidence that the first appellant knew about the drugs in the boot of the car. It was submitted that the prosecution had failed to prove that the first appellant knew the nature of the exhibits and that the first appellant had custody and control over the exhibits. Counsel referred to the evidence of the first appellant in which he had denied having seen the two bags. It was submitted that his testimony was consistent with his cautioned statement (exh D36). Further counsel submitted that it was the second appellant, and not the first appellant, who had borrowed the car from its owner SP9. For the second appellant it was

submitted that the prosecution had failed to prove that the second appellant had knowledge of the drugs. It was submitted that there was no reason for the second appellant to borrow SP9's car as he had his own car. The second appellant borrowed the car because Adi needed a car to go to Seremban and since the second appellant's adopted mother did not allow him to lend his car to others, he together with Adi and Rustam then went to see SP9 at Kelana Jaya to borrow SP9's car, the Proton Wira. Counsel submitted that it was unlikely that the owner of the car SP9 would admit that the drugs belonged to him. With regard to conduct, both counsel submitted that the act of the appellants in fleeing from the police was not because they knew of the drugs and had a common intention of trafficking but rather it was because they are both illegal immigrants without valid documents. It was submitted that it was common for illegal immigrants to run away on seeing the police. Therefore the court ought to adopt an inference favourable to the appellants. In support counsel relied on the Federal Court case of *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 wherein it was laid down as guidance to trial courts below that at the close of the prosecution's case the trial court is to 'take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused'. It was submitted that the learned trial judge had failed to consider whether the explanation for the appellants' conduct had raised a reasonable doubt that they had no knowledge of the drugs. It was further submitted that the trial judge had erred in finding that the appellants had knowledge of the drugs because of its strong smell.

[12] It is trite law that possession is an important ingredient in the charge of trafficking. Unless there is direct evidence of trafficking, the prosecution must prove the ingredient of 'possession' and the trial judge must make an affirmative finding of 'possession' before the presumption of trafficking under s 37(da) of the Act can be invoked (*Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170). The Federal Court in *Mohd Radzi Abu Bakar* said that 'where the prosecution seek to prove trafficking by relying on s 37(da) it must to prove at the trial, all the ingredients of possession'. Knowledge is one of the ingredients of possession. This was affirmed by the Federal Court in *Mohd Radzi Abu Bakar* when the court approved what Yong J said in *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158; [1967] 1 LNS 154 as follows:

> In my opinion mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, …

[13] Both the appellants denied knowledge of the drugs. In essence the

defence of the first appellant was that he was merely a passenger in the car on his way to Kepong to change money. The learned judge considered his defence and said as follows (pp 169–170 of the appeal record):

> Satu perkara lagi ialah tujuan pada hari tersebut menumpang rakan serumahnya Adi dan Rustam adalah untuk menukar wang secara tidak dirancang berkebetulan dengan mereka hendak menghantar kereta kepada tertuduh kedua yang tidak pernah tertuduh pertama kenal. Tujuan tertuduh pertama adalah hendak ke Kepong menghantar wang ke kampungnya di Acheh. Persoalannya ialah di Selayang itu sendiri terdapat banyak tempat untuk kemudahan menghantar wang dan mengikut tertuduh pertama beliau telah biasa menghantar wang menggunakan money changer di Kepong dan juga untuk membeli baju di Carrefour di situ. Beliau akui ramai orang Indonesia bekerja di Pasar Borong Selayang tetapi beliau tidak pernah hantar duit di Selayang sebab takut polis untuk keluar dari Pasar Selayang. Sebelum itu beliau setiap hari berjalan kaki pergi bekerja di Pasar Borong Selayang.

His Lordship rejected the first appellant's explanation for his presence with the second appellant in the car. We had no reason to disagree with His Lordship. Further if this explanation was true, one would have expected for the first appellant to have money on his person at the time of his arrest. However we noted that the evidence showed no money was recovered from him. The search list exh P14 and the report lodged by SP3 exh P15 were never challenged nor was SP3 cross-examined about recovery of any money from the first appellant. With regard to the second appellant we agreed with the learned judge that his defence was an afterthought created in order to raise the probability that the drugs belonged to Adi and Rustam. The essence of the defence of the second appellant was that he merely borrowed the car from SP9 and passed the car to Adi. It was his evidence that Adi wanted to use the car again that night and he had asked SP9 and SP9 had agreed. However the second appellant said that SP9 needed to use the car so he had to return the car to SP9 and collect it again later. He then drove the car to return it to SP9 as requested by SP9 but headed to Kepong first to send the first appellant. The learned judge noted that SP9 was never cross-examined about receiving a call from the second appellant. Neither did SP9 testify to the same in his examination-in-chief. We agreed with the learned judge that there were discrepancies in the defence of the second appellant which showed that the defence was an afterthought.

[14] Counsel had suggested that the drugs belonged to the owner of the car. In his judgment the learned trial judge said (p 164 of the appeal record):

> Secara prima facienya tidak munasabah untuk orang lain menyimpan dadah yang bernilai puluhan ribu ringgit atau membiarkan orang lain menggunakan keretanya dengan dadah di dalamnya.

His Lordship said further (p 177):

> Kedua-dua tertuduh mempunyai niat bersama-sama dan berpengetahuan bahawa dadah adalah dalam milikan dan di dalam kawalan dan jagaan mereka untuk tujuan diedarkan ke suatu tempat yang mereka sahaja mengetahui. Tidak mungkin orang lain akan meninggalkan dadah begitu banyak dan bernilai puluhan ribu atau ratusan ribu ringgit di dalam kereta sebagai tempat penyimpanan dadah tanpa kedua-dua tertuduh mengetahuinya.

We noted that the quantity of cannabis found in the car was not small but 53,645g packed into a total of 57 compressed slabs. We agreed with the learned judge that if the drugs did belong to SP9 as suggested, it was highly unlikely that SP9 would be foolish enough to hand over his car to be used by the second appellant with the drugs in the car boot. Further we find that counsel did not put such suggestion in cross-examination of SP9. Thus we were of the view that there was no basis for counsel to suggest that the drugs belonged to SP9. Similarly we were also of the view that it was highly unlikely for Adi to hand over the car to the second appellant with such a substantial quantity of drugs in the car boot knowing that the car was to be returned to its owner and there was the possibility that the owner of the car would discover the drugs.

[15] On the conduct of the appellants fleeing from the police, we refer to the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 cited by the learned trial judge where Augustine Paul FCJ in his judgment referred to the case of *Director of Public Prosecutor v Brooks* [1974] 2 All ER 840. In that case the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. There was evidence to show that the drugs were in the physical custody and control of the accused. The conduct of the accused in running away was held against him. Augustine Paul FCJ said that the conduct of running away thus comes, in the Malaysian context, within the meaning of s 8 of the Evidence Act 1950. It is therefore admissible and the explanation must be offered by the accused himself as required by s 9 of the same Act. It cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. In the case of *Ridwan v Public Prosecutor* [2010] 4 CLJ 570 the appellant was charged for the offence of drug trafficking. The appellant was seen behaving suspiciously and upon approaching the custom checkpoint, the appellant started retreating and running towards the immigration counter before he was eventually apprehended by security officers. The court found the prior conduct of the appellant before being arrested showed he was behaving suspiciously and therefore it can be inferred that he had the mens rea to commit the offence.

[16] Reverting to the present appeal the learned trial judge found that the appellants had mens rea possession of the drugs. His Lordship said, inter alia, as follows (p 163 of the appeal record):

Tertuduh perlu menjelaskan kenapa mereka sanggup memecut lari bila diarahkan berhenti oleh pihak polis, mengapa perlu terjun ke dalam parit dalam dan enggan naik. Anggota polis akan sentiasa bersenjata pistol di pinggang mereka (side arm) dan jika sanggup lari satu inferen dapat dibuat ketakutan mereka adalah selari dengan dadah yang dijumpai di dalam kereta mereka pandu. Jika hanya sekadar tidak mempunyai passport ianya tidak menyebabkan seseorang itu lari mempertarungkan nyawanya kemungkinan polis akan menembaknya. Malah tertuduh sendiri di dalam pembelaannya tidak mempertikaikan polis memperkenalkan diri dan arahan jangan lari jika tidak ditembak.

Untuk tertuduh pertama jika hanya tertuduh kedua sahaja yang terlibat dan mengetahui dadah di dalam booth mengapa pula beliau melarikan diri dan sanggup juga terjun ke dalam parit/sungai seperti mana tertuduh kedua.

[17] We agree that there may be another inference to be drawn from the conduct of the appellants. This is because even an innocent man may feel panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation (see *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] 4 CLJ 113). However the appellants' conduct must be weighed against the circumstances of the case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the appellants had the necessary knowledge.

[18] In the present appeal there was evidence of the car being driven in a manner sufficient to cause SP3 to be suspicious of the occupants. The appellants ignored the orders to stop the car and proceeded to flee until they were prevented by circumstances from doing so. They then ran off and jumped into the big concrete drain and remained there until finally the first appellant surrendered to SP3 whilst SP7 had to go into the drain to arrest the second appellant. Having considered the facts surrounding the conduct of the appellants we find that the trial judge has correctly exercised his discretion in coming to a conclusion that in the circumstances of this case, the conduct of the appellants is a factor, amongst others, to infer that the appellant had the necessary knowledge that there were drugs in the car. We agreed with the learned judge and find that the appellants' conduct was not compatible with their explanation that they ran away because they had no valid documents.

[19] Counsel for the first appellant further submitted that the trial judge erred in relying on the strong scent of the drugs to infer knowledge. This issue arose because in considering the issue of knowledge and rejecting the possibility that Adi or Rustam had placed the cannabis in the car, His Lordship had referred to the strong smell emitted by the cannabis. His Lordship stated as follows:

> Semasa perbicaraan cannabis tersebut walaupun disealkan di dalam beg plastik namun masih lagi berbau ini adalah sifat cannabis yang kuat baunya dan sukar untuk disorok seperti durian dan nangka. Oleh itu tak mungkin Adi dan Rustam membiarkan dadah berada di dalam kereta tersebut dan dihantar balik kepada Firdaus (SP9) dengan harapan malam nanti akan diambil semula dadah itu.

In *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132; [1982] CLJ 340 (Rep); [1982] CLJ 188 opium was found concealed in the car driven by the second appellant. The Federal Court found no error on the part of the trial judge who, in considering whether the second appellant had the necessary knowledge, had taken judicial notice of the fact that raw opium emitted out very strong disagreeable smell and that the second appellant had purchased *cempedak* fruits to camouflage the odour of the opium. In its judgment the Federal Court said as follows:

> The other material circumstance is the purchase of chempedak fruits which the customs officers found to have emitted very strong odour. The *chempedak* fruits were purchased by appellant No (2), whilst the rambutans and some sweet potatoes were bought by appellant No (1). All these were bought at Ayer Hitam and they were all intended as gifts to their sister who lives in Singapore. The learned judge in the court below took judicial notice of the fact that raw opium emitted out very strong disagreeable smell and thus drew an inference that the chempedaks were in reality intended by appellant No (2) to camouflage the odour of the opium. For ourselves having regards to the common course of natural events and human conduct we cannot find fault with such inference. Thus the purchase of the chempedaks was in reality for a different purpose, although outwardly it appeared to be innocent as it was professedly intended as a gift to his sister in Singapore and only appellant No (2) knew what that different purpose was.

Hence in our view the trial judge had not erred in taking judicial notice of the strong scent of the cannabis. In any event the grounds of judgment showed that the strong scent of the cannabis was only one of the circumstances that learned trial judge had relied on to infer knowledge. We find that there was sufficient evidence the combined effect of which was sufficient for the learned trial judge to make the affirmative finding that the appellants were in possession of the drugs.

[20] Counsel submitted that there was no explanation why SP3 took two hours from Kepong to reach IPD Sentul. We were of the view that nothing turns on the issue of the time taken by SP3 to travel from Kepong to IPD Sentul. The incident started at about 4.30pm. After taking into consideration the subsequent events that occurred we were of the view that it was not unreasonable for SP3 to reach IPD Sentul two hours later.

[21] Counsel further submitted that there was doubt as to the identity of the drug exhibits and that it was not safe for the court to accept that the drugs exhibited in court were the same drugs seized from the car. It was submitted

that SP3 in his report exh P15 had stated that the gross weight of the two bags was 57 kilos. In the original charge (p 182 of the appeal record) the weight was stated as 55,385.19g. The weight upon analysis and stated in the amended charge was 53,645g (p 183 of the appeal record). Further it was submitted that there was no explanation for the lapse of 40 minutes between the time SP3 signed the 'Perakuan Serah Dan Terima Barang Kes' and the time the exhibits were handed over to SP8 as shown in exh P16. The learned trial judge found no break in the chain of evidence from the time the car was abandoned by the appellants until the exhibits were handed over to the chemist SP5 who carried out the analysis. His Lordship said as follows (p 165 of the appeal record):

> Saksi-saksi pendakwaan yang merampas 2 beg berisi masing-masing 28 dan 29 ketulan mampat telah mengesahkan sebaik sahaja kereta tertuduh pandu ditinggalkan di Jalan Api-api, terdapat seorang anggota polis yang menunggunya iaitu (SP6) selepas itu SP3 membuat pemeriksaan ke atas kandungan di dalam 2 beg dan mengesahkan terdapat 28 ketulan dan 29 ketulan masing-masing disyaki ganja dan memberi keterangan akan rupa bentuk bungkusan dengan timah dan dibalut dengan plastic. SP3 yang membawa barang kes kepada pegawai penyiasat dan membuat tandaan dan sediakan senarai bongkar dan selepas itu serahkan barang kes kepada pegawai penyiasat SP8 dengan sediakan senarai serah menyerah dan ambil barang kes. Selepas itu disimpan selamat oleh SP8 dalam locker kabint besi sehingga dibawa keluar untuk diambil gambar dan dikeluarkan pula dan dihantar kepada Ahli Kimia Pertama SP4 dan diambil balik dan dihantar kepada Ahli Kimia Kedua SP5 dan setelah selesai analisa diambil balik dan diserahkan kepada penjaga stor eksibit SP1. Saksi-saksi cam tanda dan tandatangan masing-masing dan seal oleh pegawai penyiasat SP8 dan Ahli Kimia SP5 diakui intact dan identity dan keselamatan terjamin tidak pernah ditinggalkan tanpa jagaan selain dari diletakkan di dalam tempat penyimpanan yang selamat dan berkunci.

His Lordship had no doubt as to the identity of the drugs and was convinced that the drug exhibits produced in court were the same exhibits that were recovered from the car by SP3. We find no reason to disagree with the learned trial judge. On the evidence we were satisfied that there was no break in the chain of evidence. We find that the movement of the drugs had been sufficiently explained through the evidence of SP3, SP8, SP4 and SP5.

[22] On the issue of the differences in weight of the drugs as stated in exh P15, the original charge and the amended charge, we have perused the report exh P15 and find that the weight of the drugs as stated in P15 ie 'JUMLAH KESELURUHAN BEG A DAN BEG B' (p 17 of the appeal record *Jld* 2) indicated that it was the gross weight of the two bags which meant that it was inclusive of the contents and not the weight of the drugs alone. SP3 was not cross-examined by counsel regarding the weight of the exhibits he had stated in exh P15 in order to afford SP3 the opportunity to explain. As to the differences in weight as stated in the original charge and the weight stated in the amended charge we noted that the weight stated in the original charge was more than the weight stated in the amended charge. The weight of the cannabis at 53,645g

was far in excess of the 200g to trigger the statutory presumption of trafficking under s 37(da) of the Act. This is not a borderline case (see the Federal Court case of *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345). Thus the issue of the difference in the weight stated in the original charge, the amended charge and exh P15 was insufficient to raise any doubt as to the identity of the drug exhibits.

[23] The appellants were the only occupants of the Proton Wira car prior to their arrest. It was not in dispute that they were travelling towards Kepong. By virtue of being in custody and control of the car coupled with their conduct in running away from the scene of the crime both the appellants therefore had custody and control and knowledge of the drugs. In *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181 Lord Diplock said at p 69 (MLJ):

> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was *transporting* them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. (Emphasis added.)

In *Johar bin Mustapha v Public Prosecutor* [2009] 6 MLJ 593; [2009] 6 CLJ 193; [2009] 1 LNS 884 the Federal Court said that the act of carrying or transporting a large quantity of drugs in the boot of the car amounted to the act of trafficking of the said drugs under s 2 of the Act which provides as follows:

> 'trafficking' includes the doing of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, *transporting*, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs. (Emphasis added.)

It is pertinent to note here that in *Johar Mustapha* the amount of cannabis found in the boot of the car was only 19,152g compared to 53,645g of cannabis in the instant appeal. The learned judge had considered the defence and found that both the appellants had failed to raise any reasonable doubt in the prosecution's case. In our view the appellants had failed to provide a plausible explanation to rebut the presumption under s 37(da) of the Act. The

totality of the evidence supports the charge of trafficking. We therefore dismissed their appeals and affirmed their convictions and sentences.

Appeal dismissed.

Reported by Kohila Nesan